

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-2278

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA

Plaintiff-Appellee

Docket No. 74-2278

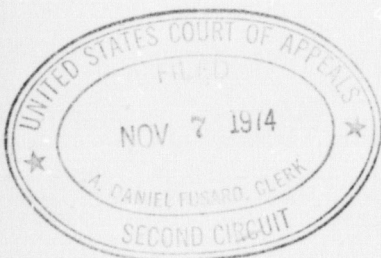
-against-

JOSE RAMIREZ-KAMOS

Defendant-Appellant
-----X

BRIEF ON BEHALF OF DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT UNDER SECOND CIRCUIT
RULE 28

The decision herein was rendered after a jury trial before United States District Court Judge CHARLES M. METZNEK in the United States District Court for the Southern District of New York on the 26th day of July, 1974.

STATEMENT OF THE ISSUE

The sole issue in this case is the sufficiency of the evidence introduced against the defendant JOSE RAMIREZ-RAMOS to enable the jury to find him guilty of the conspiracy count in the indictment.

STATEMENT OF THE CASE

The defendant-appellant, JOSE RAMIREZ-RAMOS, was indicted in the United States District Court for the Southern District of New York on an indictment of basically two counts together with a group of other defendants. The first count charged the defendant-appellant, JOSE RAMIREZ-RAMOS, with conspiring with the other named defendants to violate Section 174 of Title 21 of the United States Code. This was the conspiracy count. The second count of the indictment charges the defendant-appellant, JOSE RAMIREZ-RAMOS, violated Section 174 of Title 21 of the United States Code by buying in March or April, 1970 a quantity of heroin from the co-defendant, MIGUEL RODRIGUEZ.

A plea of not guilty was entered to the indictment by the defendant-appellant and he went to trial with a jury before United States District Judge CHARLES M. METZNER on July 25, 1974 as the sole defendant on trial.

The principal witness for the Government was a co-defendant who had pleaded guilty to the conspiracy count of the indictment in this case and had been sentenced to a ten year sentence. He testified that in March of 1970, he became involved with a co-defendant in the wholesaling of twenty kilograms of heroin which had been illegally imported into the United States. He said he had sold or distributed this to approximately fourteen persons, among them federal agents to whom he distributed two kilograms which resulted in his arrest. He testified that in March, 1970 he sold two one half kilograms of heroin to the defendant-appellant whom he had known when both were customers of a bar in New York City called the 005 Bar. Both RODRIGUEZ and the defendant-appellant were from the same town in Cuba.

The following day he testified that at the El Bayames Restaurant he sold the defendant-appellant one half kilogram of heroin.

Several days later he delivered a second half kilogram to the defendant-appellant, at the Cuba Bar. This was the sole evidence introduced against the defendant to show his involvement in the conspiracy.

One THOMAS ANGIOLETTI, an agent of the Drug Enforcement Administration, testified as to his dealings with MIGUEL RODRIGUEZ. Agent ANGIOLETTI testified that he never had any contact with nor did he see the defendant-appellant at the time of his dealings with MIGUEL RODRIGUEZ. (Tr. 74).

The Court denied the defense motion for the exclusion of all testimony with the sole exception of testimony of witness MIGUEL RODRIGUEZ, on the ground that no conspiracy had been proven, and further denied the defense's second motion for a judgment of acquittal.

The defendant testified in his own behalf and on direct examination denied ever buying any heroin from MIGUEL RODRIGUEZ. He admitted a conviction for possession of a pistol in the State of New York on March 31, 1972 (79), and on cross-examination he said it was a weapon he had obtained from the American Government for use in a proposed invasion of Cuba (84). His further testimony covered the fact that he was married and employed as a painter.

After the case went to the jury, the jury convicted the defendant of the first count based on conspiracy and acquitted him on the second

count on the purchase of heroin from MIGUEL RODRIGUEZ in the El Bayames Bar in March or April, 1970.

The defendant-appellant was sentenced on September 30th, 1974 for a period of five years on Count 1, the conspiracy count of the indictment.

POINT I

THE EVIDENCE OF A SINGLE ACT
IS INSUFFICIENT AS A MATTER OF LAW
TO CONVICT THE DEFENDANT AS
BEING PART OF A CONSPIRACY

It is a settled rule in the Second Circuit that evidence of a single act or transaction is insufficient to convict a defendant as being part of a narcotics conspiracy (U.S. v. AVILES, C.A., N.Y. 274, Fed. 2d 179; U.S. v. MANCHINO, D.C., N.Y. 179 F. Supp. 897).

MIGUEL RODRIGUEZ testified as to two sales of heroin to the defendant-appellant. The first was at the El Bayames Restaurant and consisted of a half kilogram in March, 1970 (31). This was the basis of the substantive count on which the defendant-appellant was acquitted. The second occasion was several days later and the sale consisted of a half kilogram delivered to the defendant-appellant at the Cuba Bar. (39).

The second, or substantive count of the indictment, charged the sale or transaction referred to above. The defendant-appellant was acquitted on that count. In other words, the jury found that the Government had not proven that sale beyond a reasonable doubt. As that sale was regarded as being one of the two transaction on which the Government relied to prove the participation of

the defendant-appellant in the conspiracy, it must be assumed by its verdict that the jury did not regard that sale as proven. This left only one transaction in the evidence, that of the sale of another half kilogram of heroin several days later in the Cuba Bar.

The jury's verdict in finding him guilty of the conspiracy must therefore be based on the single transaction at the Cuba Bar.

As the Court said in U.S. v. AVILES, supra, at

Page 189:

A single act may be the foundation of drawing the actor within the ambit of a conspiracy.... but, since conviction to conspiracy requires an intent to participate in the unlawful enterprise, the single act may be such that one may reasonably infer from it such an intent.

POINT II

NO EVIDENCE OF INTENT TO PARTICIPATE IN THE CONSPIRACY WAS INTRODUCED BY THE GOVERNMENT TO JUSTIFY THE CONVICTION UNDER THE CONSPIRACY COUNT

It is elementary that to justify a conviction for a conspiracy there must be evidence to show the intention of the defendant to participate in, and to become a member of, a particular conspiracy.

The fact that the defendant-appellant purchased contraband from a conspirator, with knowledge or reason to know of its contraband character, does not show that the defendant-appellant was a member of the conspiracy (DICKERSON v. U.S., C.A. 8th, 18 Fed. 2d 887).

In the instant case evidence was introduced of two transactions for the purchase of heroin from MIGUEL RODRIGUEZ. The jury acquitted

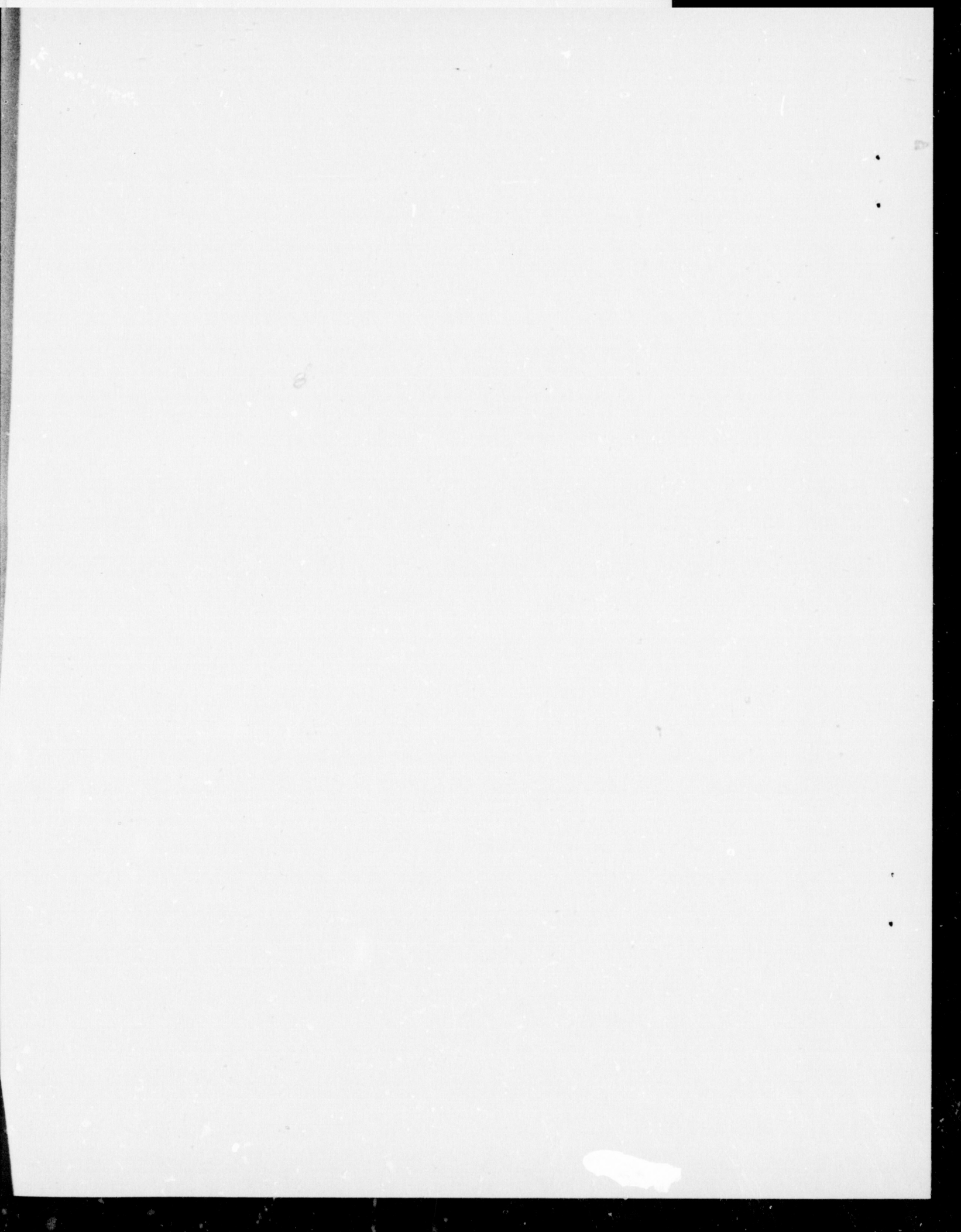
on one of these in the substantive count so that we have only the second transaction of the purchase of a half kilogram of heroin to justify the conviction for conspiracy. Accepting the evidence of MIGUEL RODRIGUEZ as true, the most that has been shown is that the defendant-appellant purchased heroin from him and there is no evidence of any intent to become part of a conspiracy.

CONCLUSION

THE JUDGMENT OF THE TRIAL COURT
SHOULD BE REVERSED AS THERE
WAS INSUFFICIENT EVIDENCE TO
JUSTIFY THE JURY IN FINDING THE
DEFENDANT GUILTY ON THE CONSPIRACY
COUNT ON THE INDICTMENT

Respectfully submitted,

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